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Supreme Court of the United States

October Term, 1957

No. 727

PRIVATE BRANDS, INC. and FRANCIS P. CAREY,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed their conviction for violations of Section 1001, Title 18, U. S. C., upon twenty-one counts of the indictment.

(a) The Opinions Below.

No opinion was rendered by the District Court.

The opinion of the Court below has not yet been officially reported; a copy thereof is hereto annexed as an appendix.

(b) Statement of Grounds of Jurisdiction.

1. The judgment of the Court of Appeals was rendered and entered on December 19th, 1957.

2. No application for a rehearing has been made.

3. The jurisdiction of this Court is invoked pursuant to 18 U. S. C., Rule 37, and 28 U. S. C., Section 1254.

(c) Questions Presented for Review.

1. Whether the individual petitioner was unjustly deprived of his constitutional right to dispense with a lawyer's help and to represent himself at the trial in the District Court, where the motion to represent himself was made in good faith, prior to the impanelling of a jury, at the opening of the day set for trial and cogent reasons therefor were given to the Trial Court indicating that the individual petitioner had made such request with full cognizance of the legal consequences of his choice, and where no disruption of the Court's business would have been thereby entailed.

2. Whether the individual petitioner was deprived of a fair trial by the Trial Court's refusal to permit him to conduct the examination and cross-examination of certain witnesses with respect to highly technical matters pertaining to a field of chemistry in which the individual petitioner was eminently qualified and his counsel admittedly had no experience or technical knowledge, when the Trial Court had indicated at the beginning of the trial that it would permit the individual petitioner to conduct such examination if the necessity therefor became apparent.

3. Did the Government make out a case for submission to the jury where it failed to submit any evidence whatsoever to prove that the chloroform delivered by petitioners was defective at the time of delivery and that peti-

tioners knew of any defects in such chloroform, and where the only proof adduced by the Government showed that this chloroform complied with the specifications of the contract between the corporate petitioner and the Government in all respects at the time of delivery.

4. Whether petitioners were deprived of a fair trial by the conduct of the prosecuting attorney in making statements in the form of assertions of personal knowledge, which were utterly without foundation in the record, in the course of his summation.

5. Was the Trial Court's charge adequate where the charge entirely failed to define the elements of the offense charged against petitioners and, particularly, where it failed to include the fundamental rule of presumption of innocence.

(d) Statutes Involved.

Title 18, United States Code, Section 1001. *Statements or Entries Generally.*

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Sixth Amendment to the United States Constitution.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

> to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Title 28, United States Code, Section 1654. Appearance personally or by counsel.

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

(e) Statement of Case.

The indictment herein was filed on December 2, 1954 and petitioners were arraigned on December 8, 1954 at which time a notice of appearance was filed on behalf of petitioners by Jeremiah Driscoll, Esq. (App. 2a).*

The indictment contains twenty-one counts, all of which stem from a contract identified by Agency #36603 entered into on or about December 26, 1951 between the Armed Services Medical Procurement Agency and the corporate petitioner, Private Brands, Inc. (App. 6a-21a). Counts 1 through 5 and Counts 11 through 21 of the indictment are based upon sixteen separate shipments of chloroform made in accordance with the terms of this contract and allege that petitioners knowingly and wilfully issued a false document, to wit, a bill of Private Brands by submitting the said bill to the Agency for payment knowing that said bill contained false and fraudulent entries, to wit, that there were being shipped bottles of "chloroform, 1 lb. U.S.P.; Do not use for anesthesia" and further containing allegedly false and fraudulent statements to wit: "I certify that the above bill is correct and just and that payment therefor has not been received. Private Brands,

* The references are to the appendix in the court below.

Inc., (sgd.) F. P. Carey, F. P. Carey—President." The only variation between these counts is in the date of the bills submitted by the corporate petitioner, the destination of the shipment, and the number of bottles shipped.

Counts 6 through 10 of the indictment exactly parallel the first five counts of the indictment and allege further that petitioners knowingly and wilfully concealed by a device a material fact, to wit, that the chloroform identified in said bills by the contractor's Lot #2081 was allegedly a portion of a lot of chloroform which had been rejected by the Agency, identified by the contractor's Lot #2049. Each of the alleged wilful concealments (Counts 6 through 10) was contained in the bills which are the basis of Counts 1 to 5 of the indictment respectively.

On December 15, 1954, a motion was made by petitioners for an inspection of the Grand Jury minutes, which motion was denied by order dated January 7, 1955 (App. 1a). Despite petitioners' counsel's request for an adjournment in order to prepare the case for trial, petitioners were forced to trial on January 31, 1955, less than two months from the date of arraignment and only twenty-four days after the entry of the order denying petitioners' motion for an inspection of the Grand Jury minutes.

The case was tried before the Hon. Clarence G. Galston and a jury. Prior to the selection of the jury, a motion was made by Jeremiah Driscoll, Esq., who had entered a notice of appearance on behalf of both petitioners, for permission to withdraw as attorney for the individual petitioner, Francis P. Carey, and requesting permission for the said individual petitioner to defend himself personally at the trial (App. 41a-42a). In response to the Court's inquiry as to the reason for this motion, the individual petitioner stated that he had not had sufficient time to prepare the case with his counsel and to coach him with respect to the technical aspects of the case, which involved a specialized field of chemistry. The Court denied

this motion (App. 42a). Thereupon the individual petitioner requested permission to conduct the cross-examination of certain witnesses on technical subjects. The trial judge reserved decision on this request (App. 42a-43a).

The Government introduced testimony at the trial showing that the individual petitioner, Francis P. Carey, was the President of Private Brands, Inc., which was engaged in the contract packaging business. On December 26, 1951, Private Brands, Inc. was awarded a contract by the Armed Services Medical Procurement Agency for 25,824 one pound bottles of chloroform of U.S.P. quality, which contract was given Agency #33603 (App. 46a, 50a, 52a).

The term "U. S. P. quality" was defined by Philip R. Hendrixson, an expert witness called on behalf of the Government, as designating chloroform which meets all of the specifications listed in the U. S. Pharmacopeia for testing the quality of chloroform (App. 81a). This witness indicated that the technical grade of chloroform manufactured by his employer, E. I. DuPont & Co. (from whom Private Brands had purchased the bulk of the chloroform for the fulfillment of its contract [App. 115a, 116a]) differed in certain respects from U. S. P. standards (App. 81a-85a).

Private Brands' records showed that it had purchased 55,900 pounds of technical chloroform from DuPont & Co. and 3,000 pounds of U. S. P. chloroform from McKesson & Robbins between February 6, 1952 and May 5, 1952 (App. 115a, 116a).

The first lot of chloroform was completed by February 18, 1952 and on that date a Government inspector, one Ronald Filera, who testified as a Government witness at the trial, appeared at the plant of Private Brands, Inc. to inspect said chloroform at its source in accordance with the provisions of the Government contract. Mr. Filera testified that he selected five samples of this first lot at random

and sealed them under heat with a green adhesive Government seal in order to prevent tampering, and that these samples were then sent to the Agency laboratory for testing (App. 99a-105a). On February 29, 1952, these samples were rejected by an Agency laboratory report showing deviations from the specifications of contract #33603, including a technical deviation for mislabeling (App. 58a, 59a).

After these deviations had been remedied, and a new label bearing lot #2081 had been affixed over the original label bearing lot #2049, in order to correct the deviation for mislabeling, the Government was notified and Mr. Filera again inspected this chloroform at Private Brands, Inc. On March 24, 1952, he selected five samples of this second lot at random and affixed his green seal to said samples, which were then mailed to the Government laboratory for testing (App. 106a). These samples were found to be in full compliance with U. S. P. specifications and were accepted by the Government and thereupon Private Brands, Inc. was authorized to make shipment of this chloroform to various designated Government depots (App. 67a, 106a, 138a).

On February 20th and again on March 4, 1952, the Government exercised the optional increase clause contained in Contract #36603 and ordered an additional total of 23,654 bottles of chloroform which were prepared by Private Brands and given lot #2105 (App. 64a, 65a). Five samples of this lot were again selected at random by Mr. Filera on May 12, 1952 and sealed with his seal, and the Government laboratory report of May 17, 1952 showed full compliance with U. S. P. specifications (App. 139a).

The initial shipment by Private Brands was made on April 19, 1952 and the final shipment was made on June 10, 1952. In the latter part of August 1952, more than four months after the initial shipment, twelve bottles of chloroform allegedly bearing lot #2081 were returned from

Fort Totten for testing when visible floating particles were observed in these bottles, and certain deviations from U. S. P. specifications were allegedly discovered at that time (App. 140a). Thereafter other bottles of chloroform bearing lot #2081 and lot #2105 were returned from other Army depots between October 1953 and April 1954 and samples of these, when tested, allegedly showed deviations from U. S. P. specifications (App. 143a-145a, 149a).

Upon the basis of these tests, the Government attempted to prove that the chloroform delivered to the Government between April 19th and June 10, 1952 failed to comply with U. S. P. specifications at the time of delivery and that petitioners knew of such noncompliance, despite the fact that the samples submitted to the Government for testing had shown full compliance with all U. S. P. specifications.

Petitioners endeavored to show that the tests taken by the Government of chloroform sent to its laboratory four months after shipment by Private Brands, and as late as two years after shipment by Private Brands, were not indicative of the quality of this chloroform at the time of its delivery to the Government. To this end a foundation was laid to enable an impartial expert witness, William Bechtoldt, an analytical chemist employed by the firm of Bendiner & Schlesinger, to testify with respect to the results of tests conducted by the independent laboratory by which he was employed which would have shown that the alleged deviations discovered in this chloroform long after delivery were attributable to a chemical interaction with the sealable enclosure specified by the Government in its contract with Private Brands.

Thus, petitioners introduced testimony through Philip Nossal, an employee of Ferdinand Gutmann & Company, the firm which supplied the bottle caps and Filmaco inner-seals which were used by Private Brands in compliance with the specifications contained in this contract with the

Government (App. 253a, 254a, 117a). Mr. Nossal testified with respect to the nature of the caps furnished by Gutmann & Company and described them as consisting of a metal cap with a liner and a transparent inner seal (App. 259a, 260a). He explained that the transparent Filmaco inner seal is caused to adhere to the lip of the bottle by an adhesive application applied by the packer to the lip of the bottle (App. 268a). He further testified that even under the most favorable application of this adhesive to the lip of the bottle some of this adhesive must naturally be squeezed toward the inside of the bottle and would therefore come in contact with the contents of the bottle and that this would necessarily happen even though the sealing operation was properly performed (App. 268a, 269a).

The testimony of Louis E. Horvath, an employee of Private Brands, showed that all of the bottles of chloroform shipped to the United States Government, pursuant to Contract No. 36603, were sealed with caps and sealable enclosures supplied by Ferdinand Gutmann & Co. (App. 267a). He further testified that on or about April 10, 1952, he had sent some Gutmann sealable enclosures and a bottle of Filmoseal glue to the firm of Bendiner & Schlesinger (App. 310a). Petitioners were prevented from putting in evidence, through the testimony of Mr. Horvath, a bottle of U. S. P. chloroform purchased from another chemical concern (App. 289a), which had been sent by Private Brands to Bendiner & Schlesinger for testing (App. 300a) for the purpose, expressed by petitioners' counsel, of showing the interaction of this chloroform with the Gutmann seal (App. 286a).

The witness, William Bechtoldt, was then qualified as an expert on chemical analysis. The Court prevented petitioners' counsel from eliciting any testimony from Mr. Bechtoldt, as a chemical expert, with respect to the possible chemical interaction between the contents of a bottle of chloroform and this Gutmann cap and the adhesive used

with the Filmaco innerseal specified in the Government contract (App. 316a-318a, 75a).

Mr. Bechtoldt, however, testified that technical chloroform purchased from the Dupont Company might pass every test prescribed by the U. S. P. standards and pass as U. S. P. quality chloroform (App. 319a), and that a finding of specific gravity of 1.480 in the course of testing, instead of the maximum specific gravity of 1.478 prescribed by the U. S. P., might be due to a slight experimental error in the testing procedures (App. 319a).

At the close of the Government's case a motion was made on behalf of petitioners to dismiss the indictment. This motion was denied (App. 231a).

During the course of petitioners' case petitioners' counsel renewed the motion which he had made at the commencement of the trial to withdraw as counsel for the individual petitioner and to permit the individual petitioner to represent himself. At the same time a specific request was made to the Court for permission to have Mr. Carey examine a defense witness. The Court denied this motion in all respects (App. 276a, 277a), as it had previously denied Mr. Driscoll's request to permit Mr. Carey to cross-examine the Government witness Philip R. Hendrixson (App. 85a).

The jury found both petitioners guilty on all twenty-one counts (App. 332a through 335a). A motion was made by petitioners to extend the time to make a motion for a new trial (App. 22a through 36a). Said motion was denied by the Trial Court (App. 336a). Each of petitioners was thereupon sentenced to a fine of $100 on each of the twenty-one counts and the imposition of a prison sentence was suspended against the individual petitioner and he was placed on probation for one year (App. 337a, 37a, 39a). Both petitioners appealed from said judgments (App. 339a through 342a). Upon appeal the judgment of the Trial Court was affirmed by the Court of Appeals.

(f) Jurisdiction of the Courts Below.

The District Court had jurisdiction under Title 18, U. S. C., Section 1001.

The Court of Appeals had jurisdiction under Title 28, U. S. C., Section 1291.

(g) Reasons Relied On.

As to Questions 1 and 2:

The Court below accepted the general principle enunciated in the case of *Adams* v. *United States*, 317 U. S. 269 at 279, that an accused has the constitutional right to the assistance of counsel and the correlative right to dispense with a lawyer's help, but then departed from this principle for reasons which were demonstrably unjustified.

At the opening of the day set for trial and before a jury had been impanelled a motion was made by petitioners' counsel, Jeremiah J. Driscoll, Esq., requesting that he be permitted to withdraw as attorney for the individual petitioner and that the individual petitioner be permitted to represent himself. In response to the Trial Court's inquiry, the individual petitioner, Francis P. Carey, stated the reasons underlying this motion to the Court. Mr. Driscoll had been retained approximately seven weeks before to represent the defendants and during the first month of his retention had been occupied with a motion for inspection of the Grand Jury minutes which was not decided until a month before the trial. The subject matter of the indictment involved extremely technical matters in the field of chemistry and the individual petitioner had not had sufficient time to coach his counsel with respect to these technicalities so that he would be enabled to conduct the necessary examination and cross-examination of witnesses at the trial. Furthermore, the individual petitioner clearly indicated his dissatisfaction with his counsel and his strong

desire to conduct his own defense (App. 42a). Nevertheless, the Trial Court denied this motion and refused to release Mr. Driscoll from his assignment (App. 42a), but when the individual petitioner requested permission to conduct the examination of certain of the witnesses on technical subjects, the Trial Court indicated its willingness to grant such permission if the circumstances dictated such necessity (App. 43a).

The record of this trial indicates clearly that the individual petitioner was justified in his lack of confidence in his counsel's ability to grasp the fundamentals of chemistry which were necessary for the purpose of conducting this trial in an orderly and effective manner. Throughout the trial, Mr. Driscoll floundered in a bewildering sea of esoteric terminology, chemical symbols and technical data with which he was almost completely unfamiliar, a situation which was aggravated by the fact that he had been accorded an unusually short time within which to prepare this case for trial.

On many occasions during the course of the trial, Mr. Driscoll was completely frustrated in his efforts to demonstrate a point which depended upon a fundamental knowledge of chemistry, and on at least one occasion, the Trial Court gave passing recognition to this ineptitude when it stated as follows:

> "The Court: I will overrule the objection.
>
> You have got to make some progress here. You seem to be spending an immense amount of time between questions and then there is difficulty on the part of the witness to understand the question, difficulty of the Court to understand what the question is directed to.
>
> I don't wonder you object, but nevertheless we have got to get along here somehow." (App. 242a)

Being cognizant of his ineffectuality, Mr. Driscoll attempted to avail himself and the individual petitioner of the Court's expressed willingness to permit the individual

petitioner to conduct cross-examination when the circumstances indicated such necessity. However, the District Court refused to grant such permission (App. 85a), although the witness's testimony had dealt almost entirely with technical matters in the field of chemistry. Later in the course of the trial, Mr. Driscoll renewed the motion which he had made at the commencement of the trial for permission to withdraw as counsel for the individual petitioner and for the individual petitioner to represent himself. He further requested permission for the individual petitioner to conduct the examination of a technical witness and the Court denied this motion in all respects, despite Mr. Driscoll's explanation that he had found it impossible to obtain the necessary technical background in the time allowed to him before the trial (App. 276a, 277a).

Again in his summation, Mr. Driscoll indicated his own feeling of ineptitude with respect to his handling of the various technical matters which he had attempted to get in evidence, both on direct and cross-examination, when he stated as follows:

> "I know I tried the patience of the Court, but I tried to do what I could. I put many witnesses on, I didn't get very far. Indeed, in some cases I didn't get anywhere, but I did the best I could." (p. 22 of Summations.)

and again at the closing of his summation as follows:

> "• • • Let me say, in closing and to reiterate, you may think of me, if you want to, of doing a bad job, a poor legalistic job, but don't because of that find my man guilty." (p. 27 of Summations.)

Upon the argument of the appeal, Mr. Driscoll appeared, together with new counsel for petitioners, and frankly stated to the Court that due to his complete unfamiliarity with chemistry and the difficult technical questions involved in the trial, he felt that he had been unable to defend Mr. Carey properly.

Upon consideration of the facts as above set forth, it is respectfully submitted that the Court below has rendered a decision directly in conflict with the ruling of this Honorable Court in the *Adams* case. Nor has any valid reason been given for its departure from the accepted principle that an accused has the constitutional right to the assistance of counsel and the correlative right to dispense with a lawyer's help.

In the *Adams* case, this Court stated:

> "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. Johnson v. Zerbst, 304 U. S. 458, 468, 469, 58 S. Ct. 1019, 1024, 1025, 82 L. Ed. 1461."

Despite this Court's holding that "the Constitution does not force a lawyer upon a defendant" the Trial Court, in the instant case, did, in effect, force Mr. Driscoll upon the individual petitioner herein.

The Court below relies on *United States* v. *Mitchell*, 138 F. 2d 831, and *United States* v. *Foster*, 9 F. R. D. 367, 372. Both cases were decided by the Court of Appeals for the Second Circuit. It is respectfully submitted that both cases are in conflict with the holding of this Honorable Court in

the *Adams* case since, in both cases, the Court of Appeals created exceptions to the *Adams* rule. However, even if these decisions were justifiable, their reasoning clearly does not apply to the facts of the instant case.

In the *Mitchell* case, the defendant had requested the right to represent himself during the course of his trial and the Trial Court's refusal to permit the defendant to defend himself was sustained upon the ground that this request had not been made at the beginning of the trial and had not been made in good faith, but for the purpose of obtaining a mistrial or of delaying the trial. However, the motion in the instant case, as has been shown above, was made at the very commencement of the trial and valid reasons were given at that time for the request. The application was obviously made in good faith and not for the purpose of delay, since no request for an adjournment was coupled with this motion, and it would be hard to imagine a situation where the reasons underlying such request could be more cogent or compelling.

It should be noted, moreover, that in denying the defendant's application in the *Mitchell* case, the Court, nevertheless, recognized the rule of the *Adams* case at pages 1010 and 1011, as follows:

> "• • • The cases cited by defendant stress equally, as, indeed, they properly should, the right of an accused to act for himself, and his right to have a lawyer assigned in his behalf. See, among others, Johnson v. Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527; Adams v. United States ex rel. McCann, 317 U. S. 269, 279, 63 S. Ct. 236, 87 L. Ed. —; Betts v. Brady, 316 U. S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595; People v. Price, 262 N. Y. 410, 413, 187 N. E. 298; and cf. 42 Col. L. Rev. 271, 1205; 31 Geo. L. J. 327.
>
> • • •

> Presumably if an accused during the trial decides that he wishes to proceed alone and without delaying the trial, and makes his decision with full knowledge of the risks he is taking ('with eyes open,' Adams v. United States ex rel. McCann, supra), that course should be open to him, in view of the fact that he must have complete confidence in his counsel, In re Mandell, 2 Cir., 69 F. 2d 830; People v. Thompson, 205 App. Div. 581, 199 N. Y. S. 868."

In the *Foster* case, the request made by one of the defendants to discharge his counsel and to sum up on his own behalf was made at the conclusion of the trial. Even under these circumstances, Judge Medina indicated that he would have granted the relief requested by the defendant as a matter of discretion if he felt that the application had been made in good faith, stating as follows, at page 342:

> "Were I convinced that these applications are based upon a genuine belief on the part of Mr. Davis that he could on his own behalf make a better summation on the evidence in the record, and by lawful and proper arguments, than could Mr. Sacher, I should without hesitation, permit him to sum up."

However, Judge Medina found that the application was merely another manoeuver by the defense intended to result in disruptive or disorderly incidents, and therefore, denied the application.

For obvious reasons, none of the arguments advanced by Judge Medina in his decision are applicable to the individual petitioner's request to represent himself in the instant proceeding, and it has not even been suggested that the individual petitioner made this application in bad faith.

The Court below cites the *Mitchell* case, cited *supra*, for the proposition that the constitutional right to the assistance of counsel and the correlative right to dispense

with a lawyer's help cannot be both exercised at the same time. Conceding this truism, it is obvious that it has no application to the instant case. The Court below erroneously supported its conclusion that "Mr. Carey in effect wished to be represented by the attorney for the corporation * * * and also act as his own attorney" by stating that the individual defendant was "content" to have Mr. Driscoll continue as attorney for Private Brands. However, the Court below entirely overlooked the fact that it was not the individual defendant's contentment which dictated Mr. Driscoll's continuance as the attorney for the corporation, but a recognized rule of law.

Upon the basis of Section 1654 of Title 28, U. S. C. and the common law rule to the same effect, the Courts have constantly held that a corporation may appear in Court only through an attorney at law.

> *Brandstein, et al.* v. *White Lamps, Inc., et al.*, 20 Fed. Sup. 369, 370;
> *Schifrin* v. *Chenille Mfg. Co. Inc., et al.*, 34 Fed. Sup. 400, 401.

Since the individual petitioner was prohibited from representing the corporation by virtue of this rule, he could not discharge Mr. Driscoll as the attorney for Private Brands without retaining new counsel for said corporation. In other words, according to the reasoning of the Court below, at the time of making the motion to represent himself, the individual petitioner was placed in this unfortunate dilemma: either he had to accept as his individual counsel an attorney in whose ability he had lost confidence, or he had to request an adjournment to seek new counsel for the corporation, thereby giving the Trial Court valid grounds for the refusal of his motion because it would necessitate undue delay of the trial.

In this connection, it is interesting to note that the Court below gave as one of its principal reasons for sustaining

the denial of the defendant's application to represent himself in the *Mitchell* and *Foster* cases, cited *supra*, the fact that the granting of such application would have occasioned undue delay.

In the instant case, the Court below refers to "delay and confusion in the trial" which might have resulted from the granting of the individual petitioner's application, as a ground for sustaining the lower Court's decision. Thus, it appears that the Court below failed to distinguish between delay occasioned in bad faith and the delay which must almost inevitably result where a defendant, not a lawyer, represents himself at a trial. If the *Adams* rule has any meaning whatsoever, its benefits cannot be denied a defendant because his self representation may slow the pace of the trial.

The rule enunciated by this Honorable Court in the *Adams* case has been followed by the State Courts and particularly by the Appellate Division of the Supreme Court of the State of New York, Second Department, in *People* v. *Thompson*, 205 App. Div. 581, 199 N. Y. S. 868. In said case, the Trial Court had assigned counsel who had been retained by the defendant but who desired to withdraw as such counsel. Upon appeal from said order of assignment, the Appellate Division, Second Department, reversed the said order upon the law and the facts and the Court held that an assignment of counsel against the defendant's wish is ill advised.

It appears from all of the foregoing not only that the decision of the Court of Appeals is in conflict with the ruling of this Court in the *Adams* case, but that the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As to Question 3:

In finding that there was substantial evidence to support the jury's verdict, the Court below recited the facts allegedly proven by the Government upon which it relied in arriving at its decision. However, after concluding that the testimony to which it adverted in its opinion was amply sufficient to support the jury's verdict, the Court below made a significant concession in footnote 2. This footnote appears after a statement by the Court below in which it admits that the Government's own proof showed that the samples taken at random from both lots of chloroform in question, when tested prior to delivery, were found to be acceptable. In the footnote, the Court below observes that the Government infers that these samples must have been tampered with by petitioners before being sent to the Government laboratory for testing, and adds significantly, "although how that could have been done without breaking the seal placed over the bottle cap by the inspector who selected the samples, is left to conjecture."

It is fair to state that the Government's entire case depended upon proof that the samples above referred to which were submitted to the Government laboratory for testing were not representative of the two lots of chloroform which were delivered by petitioners to the Government upon acceptance of these samples. In the absence of such proof, the Government failed to make out a case, and such proof could not be supplied in the form of "conjecture" alone.

For this reason, it is submitted that in this respect too, the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A careful analysis of the evidence adduced on behalf of the Government, shows clearly that the Government utterly failed to prove any of the elements necessary to sustain a charge of fraud against either of the petitioners.

In order to prove petitioners guilty of a violation of Section 1001 the Government had to establish the following facts beyond a reasonable doubt as the *sine qua non* of the crimes charged:

1. That *at the time of delivery* of the chloroform to the Government by Private Brands, under Lots Nos. 2081 and 2105, said chloroform failed to comply with U. S. P. standards.

2. That petitioners knew that the chloroform delivered to the Government failed to comply with U. S. P. standards at the time that they submitted bills for said chloroform to the Government.

3. That petitioners knowingly and wilfully made false and fraudulent entries and statements in the bills submitted to the Government.

4. That petitioners knowingly and wilfully concealed a material fact from the Government by means of a trick or device.

The evidence adduced by the Government not only failed to establish proof of even one of these necessary elements of the crimes charged against petitioners, but, on the contrary, showed that all of the facts and circumstances surrounding the delivery of this chloroform to the Government point to the petitioners' complete innocence of any crime. This is the inescapable conclusion which derives from the following analysis of the Government's case:

(a) It was proved that the five samples of Lot No. 2081 and the five samples of Lot No. 2105, which were tested by the Agency, were selected *at random* by the government inspector, Ronald Filera (App. 101a, 105a, 108a), which fact was conceded by the Court below, as shown above.

(b) It was proved that all of these samples passed the Government laboratory tests on two separate occasions

and were found to be in accordance with U. S. P. specifications (App. 138a, 139a).

(c) It was shown that petitioners were authorized to make shipment to the Government based upon these favorable reports (App. 67a).

(d) No proof whatsoever was introduced at the trial that the chloroform shipped by Private Brands, pursuant to contract No. 36603, deviated in any respect from U. S. P. standards *at the time of its delivery.*

(e) Since the Government introduced proof of two separate laboratory reports of tests of samples of Lots No. 2081 and No. 2105, which reports were dated March 29th and May 17th, 1952, showing conformity with U. S. P. specifications, a strong presumption was raised that this chloroform was not defective at the time of delivery. Therefore, in the absence of any proof whatsoever of any irregularity or inaccuracy in connection with these tests the results of these tests became conclusive upon the Government.

(f) Although the deviation which allegedly brought these lots of chloroform to the attention of government employees was perfectly visible to the naked eye, viz., floating particles in the chloroform solution, the testimony shows that this deviation was not discovered for more than four months after the first shipments had been made (App. 140a).

(g) No proof was offered by the Government to show that the alleged deviations from U. S. P. specifications, discovered four months and longer after delivery, were not caused by the effects of temperature, handling, lapse of time, or other natural causes or by interaction between the chloroform and the Gutmann cap and Filmaco innerseal. Said cap and innerseal were necessitated by the specification in contract No. 36603 of the type of sealable enclosures to be used by the petitioners (App. 75a). In

view of the lapse of time between delivery and testing, it was incumbent upon the Government to introduce such proof in order to show the materiality of these later tests.

(h) Although the United States Attorney stated, in his summation, that the five samples selected by Mr. Filera on March 24th were five bottles of U. S. P. chloroform purchased from McKesson & Robbins the record is barren of any proof that petitioners in any way influenced the selection of samples at random by the government inspector during his various inspections or tampered with the samples after they had been sealed by the government inspector. Since the Government was found by its own witness' testimony, it was also bound by the inevitable conclusion that follows from this testimony, to wit. that these samples represented a fair cross-section of lots No. 2081 and No. 2105.

This Honorable Court's attention is respectfully called to the fact that the Armed Services Board of Contract Appeals rendered a decision involving the very same issues that were raised in the instant trial in connection with the Government's attempt to recover civilly under a similar contract between Private Brands and the Government for U. S. P. quality chloroform. It is important to note that the Armed Services Board of Contract Appeals determined these issues squarely in favor of Private Brands, but what is even more important is the reasoning by which they arrived at this decision, which has been printed as an addendum to Appellants' Appendix submitted in the Court below, and appears at pages 343a to 347a thereof. In said decision, the Board of Contract Appeals stated, in part, as follows:

> "It appears that the chloroform, when delivered, was tested by experienced chemists for the Government and approved. Obviously, then, such defects as were found developed after delivery, unless it can be shown that the inspections at delivery were in error. Appellant has a right to point to these Gov-

> ernment tests and their conclusions as support for its contention that '*at the time of delivery*' the chloroform was not defective. Quite naturally the conclusions from those inspections place the burden of establishing that they were erroneous upon the shoulders of the Government. This burden, we believe, the Government has failed to uphold." (App. 344a, 345a).

Instead of assuming this burden in the instant case, the Government attempted to prove defendants' guilt entirely by inference and innuendo. Thus, testimony was introduced which, while greatly prejudicial to petitioners, had no actual probative value in the absence of some proof that the samples submitted to the Government had not been selected entirely at random, or that petitioners had tampered with the green adhesive seals applied to those samples.

The Government thus succeeded in giving a sinister connotation to the overlabeling of the bottles in lot No. 2049, which lot had been rejected on February 29, 1952, with labels bearing lot No. 2081. It had been shown that one of the reasons for rejection was a technical mislabeling which necessitated a new label (App. 59a, 61a), and one of the Government's key witnesses, Max Feinberg, admitted that this overlabeling was obvious (App. 156a), yet the Government contended that this was a ruse on petitioners' part to deceive the Government. If petitioners were attempting to dupe the Government into accepting a lot which had been once rejected, the most elementary precaution would have been the removal of the original labels.

Similarly, the testimony of the Government witnesses, Ehrlich and Carpanelli, while gravely damaging to petitioners in the eyes of the jury, furnished none of the missing proof and was immaterial to the principal issues in this case. In this connection, it must be borne in mind that none of the testimony of the Government witnesses who participated in the investigation of petitioners in 1953,

furnished proof of the defective quality of the chloroform delivered to the Government or of any irregularity in the samples selected for testing.

The Court below relies upon testimony of this nature to sustain the jury's verdict, and the jury apparently was influenced by such testimony in arriving at its decision. Yet, viewing the instant case upon its merits and in accordance with the criteria established by the Armed Services Board of Appeals, it is apparent that the Government utterly failed to make out a case against petitioner. In the words of the Armed Services Board of Contract Appeals the petitioners had a right to rely upon the Government tests and their conclusions in support of their contention that at the time of the delivery of the chloroform it was free of defects, and the Government has failed to introduce one iota of evidence to sustain its contention that the chloroform was defective at the time of delivery and, further, that petitioners knew of such defects, if they existed. Therefore, the petitioners' motion to dismiss the indictment at the close of the Government's case should have been granted and, in any event, the Court should have directed a verdict of acquittal at the conclusion of the entire case.

As to Question 4:

The prosecuting attorney, in his summation, attempted to supply the proof which had been missing at the trial by the following statement:

> "Now, I don't know how Mr. Carey got to the Agency the five new samples which bore Lot 2081, but I do know where it came from. I know that it was U. S. P. chloroform and I know that it came from McKesson & Robbins. If you will look at the exhibits in this case you will find that on March 19, 1952, exactly five days before the second group of samples were sent in to the laboratory, Mr. Carey obtained 3,000 pounds of U. S. P. chloroform from

> McKesson & Robbins. That is the source of the chloroform which he submitted as the second group of samples." (P. 34 of Summations)

This paragraph is replete with improper assertions of personal knowledge on the part of the prosecuting attorney unsupported by any evidence whatsoever appearing in the record. There is not one scintilla of evidence to show that Mr. Carey "got" any samples to the Agency or "submitted" any samples, nor that the samples submitted were anything other than samples selected at random by the government inspector, Ronald Filera, from the shipment on the floor of Private Brands' plant, and sealed with Mr. Filera's green government seal.

The Supreme Court, in the case of *Berger* v. *United States*, 295 U. S. 78, 55 Sup. Ct. 629, set forth the following standards of conduct on the part of a United States attorney, at page 633:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In the instant case the prosecuting attorney struck an extremely telling foul blow by making assertions at the close of the trial, as of his own personal knowledge, which would appear to the jury to have supplied the evidence

necessary for conviction which had been missing throughout the trial. This statement by the prosecuting attorney was not phrased as a summation of the evidence which he had presented, nor even as the necessary inference to be drawn from this evidence. Rather, it was phrased as a confidential communication to the jury of facts peculiarly within the knowledge of the prosecuting attorney.

In the *Berger* case, cited *supra*, the Supreme Court, at page 633, stated as follows:

> "• • • Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

How much more telling effect do such assertions of personal knowledge have in a case where the items of "evidence" supplied in this manner, during the prosecuting attorney's summation, are the crucial items of evidence omitted during the trial of the case. The emphatic and unequivocal manner in which Mr. Packard made these statements must have had a profound effect upon the jurors' minds.

The Court below relies on *Henderson* v. *United States*, 218 Fed. (2d) 14, cert. denied 349 U. S. 920 and *United States* v. *Klein*, 187 Fed. (2d) 873, cert. denied 341 U. S. 952. Petitioners do not quarrel with the standard of conduct set forth in the *Henderson* case. However, it is submitted that neither in context, nor out of context, were the prosecuting attorney's comments in his summation understood by any one to be a conclusion drawn from the evidence. It has been shown that there was no basis in the evidence for these comments, nor did the prosecuting attorney make any effort to give some explanation of the means of knowledge upon which he based this statement as did the prosecuting attorney in the *Klein* case. There the Court found that the prosecuting attorney, after using the

words "I know" had qualified his statement by relating it to something in the evidence. Thus, the Court stated, at 877:

> "In most instances when the expression 'I know' was used, some explanation of the means of knowledge was generally added. For example, when it was said: 'I know you can drive from Chicago from 12 o'clock noon to four o'clock in the afternoon,' it was added immediately 'because we had a man on the stand who did it.'
>
> And again, when he said: 'I know Estelle Klein is a liar' he added: 'because other people whose veracity can't be doubted have told us from the witness stand that Eddie Klein wasn't in Chicago watching a television set that night but was down here with a gun in his hand, etc.'"

It has been amply shown that the statements made by the prosecuting attorney in the instant case were made for the purpose of filling a void in the Government's proof and took the place of evidence which was clearly lacking in the Government's case.

The Government has not attempted to show that there was anything whatsoever in the record to justify Mr. Packard's assertions in his summation, but tries to minimize the prejudicial effect of these assertions by characterizing them as a review of the evidence. It is obvious that these remarks do not fall in that category and that they must have played a very important part in the jury's verdict, thereby constituting reversible error.

As to Question 5:

The Trial Court's charge, in effect, was a summation of the Government's case with special emphasis on the testimony of one Government witness, Mr. Hendrixson, a substantial portion of whose testimony was presented to the jury verbatim. Nowhere in its charge did the Court make even passing mention of the evidence presented by peti-

tioners, nor of the theory of the defense. By this omission to the jury, the impression that it deemed all of the evidence submitted on behalf of the defense as having no weight whatsoever and as not being worthy of their consideration.

There can be no question that this charge, which was improper both in form and substance, must have greatly influenced the jury in arriving at its ultimate decision. Nor can there be any question that in arriving at this decision the jury was in no way guided by the Court in establishing the existence of the necessary components of the crime of which they found petitioners guilty.

Although counsel for petitioners took no exception whatsoever to the charge as made to the jury, the law is well settled to the effect that a defendant may take advantage of errors in a charge which were seriously prejudicial to him, even though no exception was taken. To that effect see:

Barron on Federal Practice and Procedure, Vol. 4, p. 251;
Brasfield v. *United States*, 272 U. S. 448, 47 Sup. Ct. 135;
United States v. *Levy*, 153 Fed. (2d) 995;
United States v. *Balodimas*, 177 Fed. (2d) 485;
United States v. *Raub*, 177 Fed. (2d) 312;
United States v. *Buchwick Mills*, 165 Fed. (2d) 198, 201;
United States v. *Perplies*, 165 Fed. (2d) 874;
Madsen v. *United States*, 165 Fed. (2d) 507.

In the last case the Court properly held that Rule 30 of the Rules of Criminal Procedure, requiring the taking of an exception as a prerequisite to any assignment of error in connection with the charge to the jury, does not deprive the Court of the inherent power, of its own volition, to inquire into the adequacy of the charge.

As Barron in his treatise properly states, Rule 30 of the Rules of Federal Criminal Procedure must be read together with Rule 52(b), which allows plain errors or defects affecting substantial rights to be noticed although they were not brought to the attention of the Trial Court.

The law is well settled to the effect that the Trial Court, in a criminal case, has the duty of charging the jury on all essential questions of law, regardless of whether requests for such charge have been made or not.

In *United States* v. *Levy*, cited *supra*, the Court reversed the conviction upon the ground that the Court failed to instruct the jury on the elements of the offense, stating, at page 998, as follows:

> "Both parties agree that in a criminal case it is a court's duty to charge a jury on all essential questions of law, whether requested or not. Miller v. United States, 10 Cir., 1941, 120 F. 2d 968, 972; Kinard v. United States, 1938, 68 App. D. C. 250, 96 F. 2d 522, 524. A trial court's judgment, of course, will rarely be reversed for failure to give instructions, in the absence of a seasonable request or exception. See detailed discussion in Stassi v. United States, 8 Cir., 1931, 50 F. 2d 526. However, even though no request is made, a reversal is justified if the failure to instruct constitutes a basic and highly prejudicial error. Williams v. United States, 1942, 76 U. S. Pp. D. C. 299, 131 F. 2d 21."

To the same effect see:

Morris v. *United States*, 156 Fed. (2d) 525;
Schino v. *United States*, 209 Fed. (2d) 67, cert. denied 347 U. S. 937, 74 S. Ct. 627.

The Trial Court in the instant case failed to charge the jury that a false representation does not amount to fraud unless it be made with a fraudulent intent, and that the Government was compelled to prove, beyond a reasonable

doubt, petitioners' knowledge of any defects in the chloroform at the time of delivery.

Christensen v. *United States*, 90 Fed. (2d) 152;
United States v. *J. Greenbaum & Sons*, 123 Fed. (2d) 770;
Yusen v. *United States*, 8 Fed. (2d) 6;
Cooper v. *Schlesinger*, 111 U. S. 148;
Strang v. *Bradner*, 114 U. S. 555.

Although the Trial Court read the applicable statute to the jury, it entirely failed to define the elements of the offense contained in Section 1001, Title 18, U. S. C. The charge is barren of any definition of the words "knowingly and wilfully"—a most essential element of the offense under Section 1001, Title 18, U. S. C. The charge is also barren of any explanation to the jury with respect to the meaning of the terms "false, fictitious or fraudulent statements," or falsification by "trick, scheme or device", etc., etc., as referred to in said section.

Further, although the Trial Court charged the jury in connection with the burden of the Government to prove guilt beyond a reasonable doubt, the Court erred in failing to include in its charge to the jury the fundamental rule of law that a defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. By failure to charge the jury in connection with such presumption one of the most substantial rights of petitioners was violated.

Coffin v. *United States*, 156 U. S. 432.

Thus, by failing to break the alleged crimes down into their necessary components so that the jury would understand the exact nature of the criminal charges against petitioners and by summarizing the welter of highly technical and highly conflicting evidence in such unorthodox fashion, the Trial Court greatly oversimplified the questions which

should have been submitted to the jury for their consideration. Instead, the Trial Court's charge conveyed the overall impression that if the jury believed the testimony of Mr. Hendrixson, it must find a verdict of guilty, whereas such testimony does not point to petitioners' guilt in any respect. Actually, the Court's charge to the jury was more appropriate to a civil case based upon a failure to deliver in accordance with the specifications of a contract than to a criminal case based upon fraudulent representations or upon a fraudulent concealment, and was so inadequate in all respects as to gravely prejudice petitioners.

CONCLUSION

It is respectfully submitted that the various questions raised in this petition are of such importance in the administration of criminal law that there should be an authoritative determination of the same by this Honorable Court. Accordingly, petitioners ask that this Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Petitioners.

APPENDIX

Opinion of the Court Below

PALMER, MASIA AND PALMER, Attorneys for Appellants.

CORNELIUS W. WICKERSHAM, JR., United States Attorney for Appellee, MARIE L. MCCANN, Assistant U. S. Attorney, of Counsel.

SWAN, *Circuit Judge*:

The appellants were convicted on each count of a twenty-one count indictment charging violations of 18 U. S. C. A. § 1001.[1] In substance the charge was that they falsely and fraudulently represented to an agency of the United States that bottles of chloroform purchased by the government from Private Brands, Inc., of which Carey was President and controlling stockholder, conformed to the standards of the United States Pharmacopoeia, referred to as "USP," when in fact they did not, as defendants well knew. In sixteen of the counts the false representation was made by submitting to Armed Services Medical Procurement Agency a bill for payment to Private Brands which contained a certificate signed by the corporation's president that "the above bill is correct and just." In counts six to ten inclusive the appellants were charged with concealing by trick

[1] § 1001. *Statements or entries generally*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willingly falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

or device a material fact, namely, that chloroform shipped and billed to the Agency had been previously rejected for non-conformity to the USP specifications, and that this fact was concealed by submitting bills which identified the shipments under a different lot number than that which had been rejected.

The appellants' first point is that the court should have directed a verdict of acquittal for insufficiency of evidence. There is no merit in this point. There is substantial evidence to support the jury's verdict.

Private Brands, Inc., was in the contract packaging business, that is, it did not manufacture the products it sold but packaged products obtained from others. The prosecution proved from the defendants' own records that the chloroform they had, except for a very small amount purchased from McKesson & Robbins, and hence the only chloroform which they could possibly have used to fill Private Brands' contract with the Agency had been purchased from Du Pont. It was proved that Du Pont chloroform was "Technical" chloroform and did not comply with the specifications for USP chloroform as the defendants knew, and that they purchased it from Du Pont as "Technical" chloroform at a substantially lower price than they would have had to pay for USP chloroform. With respect to counts six to ten inclusive, there was evidence that after rejection by the government of samples taken from the Du Pont chloroform numbered by the defendants lot 2049, they relabelled it as lot 2081 and resubmitted the same chloroform without change; and that when, after delivery, the defendants were again advised that the shipments did not comply with USP requirements and an F.B.I. agent was sent to investigate, Carey told the agent that he, with the assistance of two other men, had reworked the chloroform with activated carbon before it was relabelled as lot 2081. But the men he named as his assistants, although instructed by him to testify that the chloroform had been reworked, denied without contradiction at the trial that

they had assisted him or had any knowledge that the chloroform had been reworked. Carey himself did not take the stand. The testimony above related is amply sufficient to support the jury's verdict.

It is true that the government's own proof showed that samples taken at random from both lot 2081 and another lot numbered 2105, when tested prior to delivery, were found to be acceptable.[2] The appellants make much of this and contend that the chloroform conformed with USP requirements when delivered and that the deviations disclosed by later tests long after delivery may have occurred as a result of chemical reaction between the contents of the bottle and the inner adhesive seal of the Gutman cap with which the bottle was closed. However, it was for the jury to appraise the force of these contentions and we cannot say that the jury acted unreasonably in relying on the undisputed facts that the defendants' only source of supply was the Du Pont "Technical" chloroform and that the evidence of an attempted collusive cover-up, as to which the F.B.I. agent testified, was corroborated by two of the defendants' employees.

The second, and most substantial, of the appellants' contentions is that Judge Galston erred in not permitting Mr. Carey, who is not a lawyer, to act as his own attorney. His request to do so was made at the opening of the day set for trial but before a jury had been empanelled. Mr. Driscoll, a competent lawyer, selected by Mr. Carey to represent him and his corporation, whose interests were conceded to be identical, had been attorney for both defendants for some seven weeks. At no time prior to the date set for trial, although the case had been twice called for trial and ad-

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[2] These samples were left at the corporation's office to be sent to the government laboratory for testing, and the government infers that they must have been tampered with before being sent, although how that could have been done without breaking the seal placed over the bottle cap by the inspector who selected the samples, is left to conjecture.

journed at the defendants' request, had Mr. Carey expressed any dissatisfaction with having Mr. Driscoll represent both defendants. His explanation of why the motion was made on the day set for trial was that he had not had time to indoctrinate Mr. Driscoll on the chemistry of chloroform and thought that he himself was better qualified to cross-examine expert witnesses whom the government would call. He was content to have Mr. Driscoll continue as attorney for Private Brands but wanted to represent himself or at least to be appointed as co-counsel so that he might cross-examine. Judge Galston denied the motion, stating that he regarded Mr. Driscoll as a very competent attorney, that he would permit Mr. Carey to sit at the counsel table for consultation, and that if a time came when he thought Mr. Carey should cross-examine, he would permit it. However, during the trial Mr. Carey was not permitted to take up the cross-examination of any witness.

It is well settled as a general principle that an accused has the constitutional right to the assistance of counsel and the correlative right to dispense with a lawyer's help. *Adams* v. *United States*, 317 U. S. 269, 279. But as this court said in *United States* v. *Mitchell*, 2 Cir. 137 F. 2d. 1006, 1010: "Obviously, however, these rights cannot be both exercised at the same time." And an accused's right to represent himself is not so absolute that it must be recognized when to do so would disrupt the court's business. *United States* v. *Mitchell*, 2 Cir. 138 F. 2d. 831, cert. den. 321 U. S. 794; *United States* v. *Foster*, S. D. N. Y. 9 F. R. D. 367, 372; see also *Overholser* v. *De Marcos*, App. D. C. 149 F. 2d. 23, 26, cert. den. 325 U. S. 889. In the case at bar Mr. Carey in effect wished to be represented by the attorney for the corporation, whose interests were identical with his own, and also act as his own attorney. The trial judge may well have thought this would cause delay and confusion in the trial. We cannot see any abuse of discretion in the way he handled the matter, nor any prejudice resulting to the defendants.

The remaining contentins of the appellants require little discussion. In point three it is urged that the indictment is multiplicitous because each false statement is alieged as a separate count. They contend that only one crime was committed since all the false statements related to deliveries made under a single contract. The cases relied upon, *Ex Parte Snow*, 120 U. S. 274 and *United States* v. *Universal C.I.T. Credit Corporation*, 344 U. S. 218, are readily distinguishable. The applicable rule is stated in *Doherty* v. *United States*, 10 Cir. 193 F. 2d 487, 488; *Berg* v. *United States*, 9 Cir. 176 F. 2d. 122, 125, cert. den. 338 U. S. 876; *United States* v. *Marzani*, D. C. D. C., 71 F. Supp. 615, 618, aff'd, *Marzani* v. *United States*, 168 F. 2d 133, aff'd, 335 U. S. 895, rehearing granted and decision adhered to, 336 U. S. 922. Furthermore, any objection as to multiplicity of the indictment was waived by not raising it before trial, *Anderson* v. *United States*, 6 Cir. 189 F. 2d. 202, 204. Since the appellants could have been fined $10,000 on any one count and Carey could have been given a prison sentence under 18 U. S. C. A. § 1001, it is obvious that they have not been prejudiced by the sentences imposed.

We find no reversible error in the rulings on evidence, the exclusion of which is complained of in appellants' point four. The necessary foundation to make it admissible was not laid.

The complaint about the prosecutor's summation is much ado about nothing. From the context it is clear that his statement that "I know" that the samples which bore lot number 2081 came from the McKesson & Robbins chloroform was a conclusion drawn from the particular evidence to which he referred, and could not have led the jury to believe that his statement was based on evidence known to the prosecutor but not introduced. *Henderson* v. *United States*, 6 Cir. 218 F. 2d. 14, 19, cert. den. 349 U. S. 920, and *United States* v. *Klein*, 7 Cir. 187 F. 2d. 873, 876, cert. den. 341 U. S. 952 are applicable, not *Berger* v. *United States*, 295 U. S. 78.

The alleged errors in the charge of the court are not sustainable. The failure to define "wilfulness" or charge as to the presumption of innocence was not error in the absence of requests to do so. See *United States* v. *Capitol Meats*, 2 Cir. 166 F. 2d 537, 538, cert. den. 334 U. S. 812; *United States* v. *McGuire*, 2 Cir. 64 F. 2d. 485, 493. The failure of a defendant to request charges omitted or to take exception to the charge as given normally precludes any claim of error,[3] although an appellate court may reverse for errors not called to the attention of the trial judge if they are such as affect substantial rights.[4] We see no errors of this character and the charge as given was correct and adequate.

Judgment affirmed.

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[3] Rule 30 F. R. Cr. P.; *United States* v. *Campisi*, 2 Cir. 248 F. 2d 102, 107.

[4] Rule 52(b) F. R. Cr. P.